No. 41103-2-II

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,
Respondent

v.

JOSE GASTEAZORO-PANIAGUA,
Appellant.

APPELLANT'S OPENING BRIEF

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I. ASSIGNMENTS OF ERROR

A. Mr. Gasteazoro-Paniagua assigns error to entry of the judgment of conviction in this case.

B. After promising Mr. Gasteazoro-Paniagua that the court and the lawyers would only discuss scheduling matters during his absence from court, the trial judge then frequently conducted hearings about pending matters—discussing and deciding issues of fact and law. Conducting these portions of trial without Mr. Gateazoro-Paniagua being present violated his right to due process under the Federal Constitution, as well as his right to appear and defend in person under the State Constitution.

C. The trial court erred when it failed to suppress Gasteazoro-Paniagua's statements made after he commented that he would "just need to talk to his lawyer," but where the officer continued to question defendant.

D. The trial court erred by refusing to give an instruction telling jurors to treat the testimony of the jailhouse informant with caution, where the State's case depended almost entirely on informant testimony.

E. The trial court erred when it twice permitted the State to impeach Jose Muro's testimony that he did not see his shooter with statements that Gasteazoro-Paniagua shot him; where the State

failed to ask Muro about either inconsistent statement; where the court did not give a limiting instruction for one of those statements; and where the prosecutor later argued jurors could use those statements as substantive evidence.

F. The trial court erred when it denied the defense motion for a mistrial after a police officer stated that their investigation led them to conclude that Mr. Gasteazoro-Paniagua shot Mr. Muro in violation of a motion in limine.

G. The trial court erred by admitting the substance of testimonial hearsay when it allowed the police to testify regarding the perceived motive for this crime and relay statements by defendant's wife that led to the recovery of incriminating evidence.

H. During closing argument, the prosecutor improperly argued that Mr. Gasteazoro-Paniagua bore the burden of proving someone else was responsible for the shooting and that he should be disbelieved because he was able to listen to others testify before he took the stand.

I. The trial court erred by instructing jurors that they must be unanimous in order to acquit him of the firearm enhancement, but where the law provided that only one vote was needed for acquittal.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. The federal and state due process clauses provide a fundamental right to be present at all critical phases of a trial. Did the trial court deny Mr. Gasteazoro-Paniagua the right to be present for certain critical portions of his trial when issues regarding the presentation and admissibility of evidence—issues of both law and fact—were discussed without him on seven different occasions during six different days of his jury trial after he had been assured by the Court that only scheduling matters would be discussed?

B. Was Mr. Gasteazoro-Paniagua's statement that he "guessed" he would need to talk to his lawyer in response to the police telling him that they had probable cause to believe he shot Mr. Muro an unequivocal request for counsel under the Fifth Amendment? Should the trial court have suppressed defendant's subsequent custodial statements where interrogation continued after Gasteazoro-Paniagua invoked the right to counsel?

C. Is there any reason, in fact or in law, to treat the statement of a jailhouse informant who is offered the dismissal of charges and a greatly reduced sentence in return for his testimony any differently than an accomplice turned witness who is given the same incentive for his testimony? Did the trial court err when it concluded that the law precluded an instruction telling jurors to

carefully evaluate the testimony of a jailhouse informant based only on the conclusion that instruction applied only to accomplices?

D. Was Gasteazoro-Paniagua harmed by inadmissible police opinion testimony that their investigation led to him as the person who shot Muro, especially where the prosecutor argued that defendant had not presented any proof of another suspect?

E. Was the State improperly permitted to introduce the substance of testimonial hearsay and, if that hearsay was not offered for the truth of the matter, was the evidence more prejudicial than probative, especially in light of the State's argument which went far beyond the bounds of admissibility?

F. Was the prosecutor's argument that Gasteazoro-Paniagua should be convicted because he had not produced evidence of another suspect improper? Was the prosecutor's argument, unsupported by any evidence, that jurors should find Gasteazoro-Paniagua's testimony unbelievable because he testified after the State's witnesses improper? Do these arguments, which ask the juror to draw negative inferences from the exercise of constitutional rights, merit reversal?

G. Was the instruction that jurors must unanimously agree to acquit on a firearm enhancement a structural error?

III. STATEMENT OF THE CASE

A. Procedural History

The State charged Jose Gasteazoro-Paniagua with attempted murder by Information filed on January 4, 2010. The Information was amended on June 10, 2010 to charge attempted murder with a firearm and unlawful possession of a firearm. CP 104.

Prior to trial, the defense sought to suppress Mr. Gasteazoro-Paniagua's custodial statement. The court held a hearing where Detectives Buckner and Schultz testified they told defendant they had "probable cause" to arrest and charge him. Gasteazoro-Paniagua responded: "I mean, I guess I'll just have to talk to a lawyer about it, and you know I'll mention that you guys are down here with a story and..." RP 88-89. The trial court found Gasteazoro-Paniagua's answer was an equivocal request for counsel and that the police could continue to interrogate him, which they did. CP 180. The court admitted the evidence. *Id.*

Mr. Gateazoro-Paniagua was tried by a jury. Defendant sought, but was denied an instruction directing jurors to scrutinize informant testimony carefully. CP 142 (attached as Appendix A). With regard to the firearm enhancement, the jury was instructed they must be unanimous to convict or acquit. CP 152 (attached as

Appendix B). On June 29, 2010, the jury returned verdicts guilty. CP 157 - 159.

Mr. Gasteazoro-Paniagua was sentenced on August 11, 2010, to 429.75 months in prison. CP 183. A notice of appeal was filed that same date. CP 184.

B. Facts

The Shooting of Jose Muro

On December 30, 2009, Jose Muro was working in the back store room at the Buy Low Market when a man wearing a dark hoody walked into the store, went into the back room, and shot Muro five times. RP 594, 621, 737. Muro survived.

The issue at trial was whether Jose Gasteazoro-Paniagua shot Muro.

The Unidentified Shooter

The video surveillance footage did not help answer the question because the shooter's face was obscured. RP 628, 729. Likewise, the people present at the shooting were unable to say who shot Muro. The store clerk, Saram Nhor, who knew Gasteazoro-Paniagua from previous meetings at the store, was unable to identify the shooter from a photo montage. RP 620, 621, 628-630. A bystander who was near the front door of the Buy Low Market when the shots were fired, Kendra Kessee, recognized Gasteazoro-

Paniagua's photo in the montage, but could not identify him as the shooter. She claimed that the shooter was wearing all white and a white coat. RP 498-500.

Mr. Muro testified under oath he could not identify the shooter. RP 737.

The State Bargain for Informant Testimony

Because no one could identify the hooded shooter, the State's case relied heavily on the testimony of a jailhouse witness, Trent Jacobsen. Mr. Jacobsen claimed that Gasteazoro-Paniagua confessed details of the crime to him, a hotly contested fact. RP 1423 - 1446.

Jacobsen met Gasteazoro-Paniagua in jail. Jacobsen was facing his own homicide charge, as well as three first degree robbery charges. If convicted, Jacobsen could have served more than 60 years in prison. RP 1446-1449. So, Jacobsen decided to attempt to trade information for leniency. RP 1452. He was wildly successful. In return for his testimony, the State dismissed the murder charge and Jacobsen was sentenced to only 126 month for robbery. RP 1448.

Defense counsel sought, but was denied an instruction (similar to the accomplice testimony instruction) telling jurors to carefully consider informant testimony. CP 142 (Appendix A). The

court ruled: "It's inapplicable because he's not a co-defendant and to hold him to the standard, especially where they say: 'You should not find the defendant guilty upon such testimony unless after carefully considering the testimony you're satisfied beyond a reasonable doubt of its truth.' This is applicable to co-defendants, not to others." RP 1904.

Gasteazoro-Paniagua denied shooting Muro. He testified that he was in Portland, Oregon having dinner with his girlfriend at the time of the shooting. RP 1833. When he learned of the shooting, he immediately called one of Muro's girlfriends, Laura Owings to express concern. RP 1833-1834; RP 1290. Gasteazoro-Paniagua later went to Yakima, Washington to stay with a friend where he was arrested on January 7, 2010. RP 1859.

The State's Impeachment of Jose Muro

The State challenged the testimony of the victim. Jose Muro was asked on direct, "Did you get a chance to see who shot you?" and responded, "No, I didn't." RP 737. The State later asked Muro: "Have you ever told anybody that you saw Neeka (defendant) shoot you?" Muro again responded: "No." RP 748.

Not satisfied with this answer, the State impeached Muro through the testimony of Yuliana Pina Venegas, as well as the police. RP 790; RP 1290; RP 1531; RP 1658. Initially, the court

would not permit the State to impeach Muro about any supposed inconsistent statements because Muro had not been specifically asked about those statements and given a chance to explain. RP 793-794; RP 1227. Although Muro was not recalled to testify (RP 1276-87), the court nevertheless allowed the impeachment over defense objection. RP 1260 - 1271.

Ms. Venegas was asked "Did Jose (Muro) ever tell you who shot him?" She answered, "Yes." RP 1290. Next, she was asked, "Was that was the only time Jose identified who shot him?" and responded, "No, there was a second time." RP 1291. "He told me that when his brother Johnny was there, too." RP 1291. No limiting instruction was given following this testimony. RP 1291.

Mr. Venegas' testimony was a surprise to defense counsel, but not the State. RP 1217 - 1218. Defense counsel first learned that Venegas intended to testify that she heard Muro name the shooter when she was asked the question on the witness stand by the State. Defense counsel objected: "This was the first I've heard of this," noting that Venegas had been interviewed and "she didn't say any of this." RP 794.

When the court inquired of the State, the State admitted that it had known the information for some time, but had inexplicably failed to disclose the new information to the defense. RP 1221-22.

The State also failed to timely provide the defense with information about other benefits bestowed on Venegas. RP 1279-82; RP 2048-49. Because of the discovery violations, the trial court eventually ruled:

> I will allow Ms. Venegas to be called. And the questions that can be asked are, Did he tell you--did he name he person to you who committed this, and did he see anybody coming in? But you're not to name the name. Then you can get to the inconsistencies. And that's because I'm not going to suppress the evidence, which is the remedy that should be imposed in this case when people violate this in the middle of trial. I will allow you to do that but not get the name in on the basis that I think that that's the perfect remedy for this.

RP 1227 – 1228.

In addition to Venegas' testimony, the State was permitted to impeach Muro's testimony through the testimony of the case detectives. RP 1535; RP 1658. Detective Buckner testified he asked Muro, "If we arrested Neeka (defendant) for this, would we be arresting the wrong person?" RP 1536. Defense objected and the Court read a limiting instruction: "I'm allowing the following testimony evidence but you may consider it only for the purposes of impeachment of the victim. You must not consider the answer for any other purpose or for evidence of guilt of the crime charged." RP 1537. In response to the officer's question, Muro said "No." RP 1537.

Detective Buckner further testified he asked Muro: "Did Neeka shoot you?" Muro's response was "Yeah." RP 1538. Detective Schultz also was also permitted to testify, "Mr. Muro told me that Jose Gasteazoro-Paniagua shot him." RP 1658. The Court instructed the jury that they could consider this testimony only for impeachment of Mr. Muro. RP 1658.

Police Opinion Testimony that Gasteazoro-Paniagua Was the Shooter

In addition, to the impeachment of Muro, a police officer testified over defense objection that their investigation established that Gasteazoro-Paniagua shot Muro. RP 602.

Prior to trial, the trial court ruled that the police were not permitted to testify to their opinion that Gasteazoro-Paniagua was responsible for the attempted murder of Muro. RP 150.

During cross-examination, defense counsel asked Officer O'Dell if he was personally able to identify either individual in the surveillance video. RP 601. Officer O'Dell responded, "The one in light clothing, no; the one in dark clothing was Mr. Paniagua (Gasteazoro-Paniagua). RP 601. Later, Officer O'Dell stated that he could not identify the person in the surveillance video, but "(t)hat's what our investigation – led to." RP 602.

The next day, defense counsel moved for a mistrial. In the alternative, the defense sought a curative instruction. RP 772. The court denied both requests. RP 773.

Testimonial Hearsay Referenced During Trial

During trial, the State was repeatedly permitted to introduce the substance of out-of-court statements which it used to allege defendant's motive and imply his consciousness of guilt. For example, the prosecutor asked Detective Buckner what he and Detective Schultz were told by various family members of Muro. RP 838. Defense counsel objected on hearsay grounds and the Court ruled: "Tell us what you heard, but be a minimalist, detective." RP 839. The Court also ruled, "I'm going to allow it briefly. Again, it's not offered for the truth of the matter at this point." RP 839. The detective then relayed information about Gasteazoro-Paniagua and his past and recent relationship with the victim Muro, which the State later argued was proof of motive. RP 839-40.

Melissa Ibanez, Gasteazoro-Paniagua's wife, did not testify. However, Detective Buckner was permitted to tell jurors that when they were with her, "we were directed to a dumpster, and in the dumpster recovered some clothing, some items of what we determined to be evidence." RP 853-860. The detective was also permitted to testify, again over objection, that they recovered motel

registration information as a result of talking to Ms. Ibanez. RP 860. This evidence was also used by the State to suggest guilt. RP 1947; RP 1949.

Closing Arguments

During closing argument, the prosecutor attacked Gateazoro-Paniagua's testimony by arguing, "he's got the advantage of sitting through and listening to all the testimony....he neatly fills in and completes the story." RP 1993. "Ladies and gentlemen, like I said, he's had time, months to come up with whatever stories he wants to tell you, and expects you to believe and take that as gospel after he told you that he's lied to the police." RP 1993-94. The prosecutor had not cross-examined defendant along these lines.

The attack continued: "Shouldn't he have told this to the police when he was first arrested so they -- they can check it, check it out, make sure that Smokey's car is still in Yakima parked around the corner like he indicated so that the police can find the car and return it to the rightful owner?" RP 1994. "Nothing. Why? It's not true." RP 1994.

In addition, the prosecutor argued that jurors should convict because defendant failed to prove someone else shot Muro, stating: "There's been no alternative theory, no alternative suspect." RP 1989.

The Trial Court Repeatedly Conducted Portions of Trial in Gasteazoro-Paniagua's Absence

Throughout trial, the judge repeatedly asked Gasteazoro-Paniagua if he wished to waive his presence for "scheduling" matters and then often discussed matters of substance involving the facts and the law in defendant's absence.

For example, after telling Gasteazoro-Paniagua the Court and lawyers would only discuss "planning matters, nothing of substance, after the defendant left the court ruled that it would not order the Sheriff's department to take DNA paperwork to the defense expert's office. RP 889; RP 899. Shortly thereafter, the court had an in depth discussion about the lack of cooperation by Melissa Ibanez (defendant's wife), about the marital privilege and who is required to raise the privilege. RP 909. The issue was not discussed in depth again.

On June 21st, the court ruled that it would give a limiting instruction if the State impeached Mr. Muro's statement. RP 1205-06. The same issue was discussed on June 23rd (RP 1503), also during a time when defendant was not present. At this hearing, the Court ruled what specific limiting instruction he would give when the witnesses testify and gave very specific directions to the prosecutor and Detective Buckner how to ask and answer questions.

RP 1511 - 1514. Moments after the hearing, defendant entered the court and the court stated: "We just talked a little bit about scheduling again. We did talk about a couple of stipulations that the parties agreed to, and that was pretty much it." 1516.

On June 22nd, the Court told defense counsel in defendant's absence that the Court would not grant a motion to dismiss based on insufficient evidence at the close of the State's case. RP 1489.

On June 23rd, the Court and lawyers discussed and agreed upon a stipulation about Gasteazoro-Paniagua's criminal history when he was absent and only scheduling matters would be discussed in his absence at the end of the court day June 22nd. RP 1485; RP 1503.

II. ARGUMENT

A. The Trial Court Violated Gasteazoro-Paniagua's Right to Be Present During All Critical Phases of His Trial.

Introduction

This Court recently held that emails exchanges involving only the court and lawyers on the issue of the "for cause" excusal of jurors violated a criminal defendant's state and federal constitutional right to be present. *State v. Irby,* 170 Wash.2d 874, 246 P.3d 796 (2011). This Court found the error harmful because the State could not prove beyond a reasonable doubt that Irby's presence was

irrelevant and would have made no difference. *Irby* reaffirms the core value that a defendant has a right to be present at all meaningful parts of his trial—an exceedingly simple requirement to honor.

In this case, Gasteazoro-Paniagua's right to be present was violated when the Court repeatedly discussed factual and legal matters relating to the conduct of the trial and the testimony of the witnesses when he was absent. These discussions are especially problematic because the trial court repeatedly assured Gasteazoro-Paniagua that only ministerial matters would be discussed. To the contrary, adversarial issues were heard and sometimes decided after the defendant was misled into waiving his presence.

The Constitutional Right to Be Present

Whether a defendant's constitutional right to be present has been violated is a question of law, subject to *de novo* review. *Irby, supra.*

A criminal defendant has a fundamental right to be present at all critical stages of a trial. *See* U.S. CONST. AMEND. 14 ("In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him."); WASH. CONST., ART. 1, § 22; *Rushen v. Spain*, 464 U.S. 114, 117 (1983). The accused "has a right to be present at all important stages of trial." *McKaskle*

v. Wiggins, 465 U.S. 168, 178 (1984) (*dictum*); *Insyxiengmay v. Morgan*, 403 F.3d 657, 669 (9th Cir. 2005).

"The [Supreme] Court has assumed that, even in situations where the defendant is not actually confronting witnesses or evidence against him, he has a due process right 'to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.'" *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987) (dictum); see also *United States v. Gagnon*, 470 U.S. 522, 526 (1985) (per curiam) (dictum) (same, quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105-06 (1934)); *Faretta v. California,* 422 U.S. 806, 819 n.15 (1975) (dictum) ("an accused has a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings");

The right to be present extends to situations where the defendant is not actually confronting witnesses or evidence against him. *United States v. Gagnon*, 470 U.S. 522, 526 (1985) (a defendant has a right to be present at proceedings whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge). *Snyder v. Massachusetts*, 291 U.S. 97, 105-106 (1934). The only times that a criminal

defendant's absence is acceptable is when his or her presence would be completely useless. *Id.* at 106-07.

As a result, in the ordinary case a defendant's physical presence in court is required during all proceedings in which factual matters are at issue or in which dispositive rulings are made by the court. In fact, many trial judges routinely permit a criminal defendant to be present during even chambers conferences on minor matters, and competent counsel should ordinarily request his client be allowed to attend every proceeding in the case. When a defendant is absent from a portion of trial, he is unable to consult with counsel.

Washington Courts have scrupulously protected the accused's right to be present at all critical stages, both under the federal constitution and under our own Constitution's right to be present provision. *Irby, supra.* In that case, even the dissent noted that when factual or legal issues are addressed, it is a critical stage of trial where a defendant's presence is required.

The State Cannot Prove Harmlessness Beyond a Reasonable Doubt

The burden of proving the harmlessness of this type of error is on the State and it must do so beyond a reasonable doubt. *Irby,* 170 Wash.2d at 886.

The dissent in *Irby* makes it clear how hard it is to satisfy that burden. The dissent argued that Irby was not harmed by his absence, because his "presence could have made no difference in his ability to defend because release of jurors for hardship reasons is a matter solely within the discretion of the trial court, and Irby's presence would have made no difference." *Id.* at 888. The majority disagreed and reversed. However, even the dissent agreed that any discussion of factual or contestable legal issues requires the defendant's presence.

Because Mr. Gasteazoro-Paniagua was denied the simple, basic, and fundamental right to attend these portions of his trial, he is entitled to a new one.

B. The Trial Court Erred When It Admitted Gasteazoro-Paniagua's Custodial Statement Because He Made an Unequivocal Request For Counsel

Facts

After he was taken into custody and told by the police they had probable cause for his arrest, Gasteazoro-Paniagua responded: "I mean, I guess I'll just have to talk to my lawyer about it..." RP 89. The interrogating detective did not cease questioning or even seek to clarify, but instead immediately replied: "Understand – when we leave here, understand this really clearly, when we leave and go back we're done with conversations with you. Okay, there's not gonna be

a second chance to say, Okay let me explain something, let me get something out, let me tell you my side and so on?" RP 102. Gasteazoro-Paniagua then spoke to the police, although he never expressly waived his right to counsel.

In addition to admitting defendant's custodial statements, during closing argument, the prosecutor made reference to the statement, calling Gasteazoro-Paniagua a liar for not providing all of the facts regarding his whereabouts later uncovered during their investigation. RP 1992- 94.

Unequivocal Request for Counsel

A suspect subject to custodial interrogation has a Fifth and Fourteenth Amendment right to consult with an attorney and to have an attorney present during questioning, and the police must explain this right to the suspect before questioning. *Miranda v. Arizona,* 384 U.S. 436, 469-73 (1966). When an accused invokes his right to have counsel present during custodial interrogation, he may not be subjected to further questioning by the authorities until a lawyer has been made available or the suspect himself reinitiates conversation. *Edwards v. Arizona,* 451 U.S. 477, 484-85 (1981). This rule is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." *Michigan v. Harvey,* 494 U.S. 344, 350 (1990). The "rigid prophylactic rule" of *Edwards*

requires a court to "determine whether the accused actually invoked his right to counsel." *Smith v. Illinois,* 469 U.S. 91, 95 (1984).

In *Davis v. United States,* 512 U.S. 452 (1994), the Supreme Court held that "[t]o avoid difficulties of proof and to provide guidance to officers conducting interrogations," the determination whether an accused actually invoked his right to counsel is "an objective inquiry." *Id.* at 458-59. The suspect must "unambiguously request counsel." *Id.* at 459. "Although a suspect need not speak with the discrimination of an Oxford don, he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Id.* In *State v. Radcliffe,* 164 Wash.2d 900, 194 P.3d 250 (2008), our Supreme Court recently held that an equivocal request for counsel does not foreclose police questioning on matters other than clarifying the request. However, it remains clear that when an arrestee unequivocally requests counsel all interrogation must cease.

The question in this case is whether, viewed from an objective standpoint, Gasteazoro-Paniagua's statement "I guess I will just have to talk to my lawyer about it" was an unequivocal request for counsel. Studying both caselaw and linguistics leads to the conclusion that defendant unambiguously requested counsel.

In *Davis,* the Supreme Court found that the phrase "[m]aybe I should talk to a lawyer" was ambiguous, and therefore the police were not required to cease questioning. 512 U.S. at 462. However, it is important to note that the circumstances in Davis included the suspect's *explicit* waiver of his right to counsel at the beginning of the interrogation.

The cases finding an unequivocal invocation of the right to counsel are incredibly similar to the case at bar. See *e.g., Abela v. Martin*, 380 F.3d 915, 926 (6th Cir. 2004) ("maybe" I should talk to my lawyer who was named by defendant was unequivocal); *United States v. Perkins,* 608 F.2d 1064, 1066 (5th Cir.1979) ("I think I want to talk to a lawyer" was an unequivocal request for counsel). But see *Taylor v. State,* 689 N.E.2d 699, 703 (Ind.1997) (defendant's statement that "I guess I really want a lawyer, but, I mean, I've never done this before so I don't know" did not invoke right to counsel).

The use of phrases like "I think," "I suppose," or "I guess," placed at the beginning of a sentence do not imply equivocation. If the police told the defendant, "I guess you are under arrest," there would be no mistaking that meaning. Mr. Gasteazoro-Paniagua's statement was no different. See also Van Bogaert, Julie (2006) *I guess, I suppose and I believe as pragmatic markers: Grammaticalization and functions*. BELL *New Series* 4: 129-149. It

is clear that Gasteazoro-Paniagua's statement was deferential to the authority of the police ("I mean, I guess..."). However, viewed from an objective standpoint, it was also unequivocal.

Gasteazoro-Paniagua was obviously harmed by the improper admission of his statements. The State not only introduced those statements to be used against him, but also repeatedly referred to those statements in arguing that the defendant lied because he was guilty. This is a constitutional error. Consequently, the State must disprove harm beyond a reasonable doubt. Given both the weakness of the State's case and the State's reliance on the custodial statements, prejudice is easily established. This Court should reverse and remand for a new trial.

C. The Trial Court Erred by Refusing to Give an Instruction to Treat the Testimony of a Paid Informant With Caution.

Recent studies on wrongful convictions teach that there is no meaningful difference between accomplices who agree to testify in exchange for reduced charges and sentences and jailhouse informants who do the same. See *ABA Report and Recommendations on Jailhouse Informant Testimony* (2005); *Jailhouse Snitch Testimony—A Policy Review*; The Justice Project (2007). If anything, the jailhouse informants are a less reliable group—a dubious distinction.

Washington law has long permitted an instruction that jurors should treat the testimony of an accomplice with caution. See WPIC 6.05. In this case, the defense sought a similar instruction. Defense counsel argued that "while Jacobsen was not an accomplice, he clearly fell within the scope of what that instruction is for, and that is because of his position as informant in this particular case. We believe his testimony obviously is subject to the same scrutiny that one would use on an accomplice, the same type of bias and benefits that you see in an accomplice testifying for the State was here in this particular case, and as such, we believe that despite the fact that he wasn't an accomplice, we feel that he falls within the confines of that particular situation." RP 1902-03. The Court refused the instruction, not because the defense logic was unsound, but merely because, "I don't think this instruction has been approved by the Washington Supreme Court and Court of Appeals...." RP 1904.

This Court should approve the proffered instruction in this case and hold that the testimony of both jailhouse informants and accomplices should be treated with caution.

This Court would not be alone if it adopted the rule urged by Gasteazoro-Paniagua. Instead, it would join a robust line of authority.

For example, the Fourth Circuit has expressed its deep concern over the use of compensated informant testimony and its reluctance to admit such testimony absent stringent judicial controls. *United States v. Levenite*, 277 F.3d 454, 459-62 (4th Cir. 2002). That court has prescribed additional procedural guarantees that the government must adhere to where compensated informant witnesses are contemplated. Before such testimony will be permitted: (1) the compensation arrangement must be disclosed to the defendant, (2) the defendant must have the opportunity to cross-examine the witness, and (3) the jury must be instructed to engage in heightened scrutiny of the witness. Among the other federal circuits that have considered this question, there is a consensus that an informant instruction is required when the informant's testimony is uncorroborated by other evidence. *See United States v. Bosch,* 914 F.2d 1239, 1247 (9th Cir.1990); *United States v. Hill,* 627 F.2d 1052, 1054-55 (10th Cir.1980); *United States v. Garcia,* 528 F.2d 580, 587-88 (5th Cir.1976); *United States v. Griffin,* 382 F.2d 823, 828 (6th Cir.1967). These courts have explained that an informant instruction is necessary because a general witness credibility instruction is not sufficiently cautionary for informants because of special concerns about the incentive that they have to fabricate information for their own benefit. See *United States v. Williams,* 59

F.3d 1180, 1183-84 (11th Cir.1995) (stating that sole function of an informant instruction is to make jury aware that an informant's testifmony is to be viewed with caution); *Garcia,* 528 F.2d at 588 ("When the case is close and the witness particularly unreliable ... this Court has declared that the failure to give a cautionary instruction amounts to plain error."); *see also On Lee v. United States,* 343 U.S. 747, 757-58 (1952) ("The use of informers, accessories, accomplices, false friends, or any of the other betrayals which are 'dirty business' may raise serious questions of credibility. To the extent that they do, a defendant is entitled to broad latitude to probe credibility by cross-examination and to have the issues submitted to the jury with careful instructions."). In other words, the jury needs to be instructed to scrutinize informant testimony more carefully than other witnesses, even biased witnesses, because of the potential for perjury born out of self-interest. *See* Alexandra Natapoff, *Snitching* 77 (2009) ("[W]hen defendants do go to trial, numerous exonerations reveal just how often juries believe lying criminal informants, even when juries know that the informant is being compensated and has the incentive to lie. A report by the Center on Wrongful Convictions at Northwestern School of Law describes fifty-one wrongful capital convictions, each one involving perjured informant testimony accepted by jurors as true."). See

Robert S. Hunter, *Fed. Trial Handbook: Criminal* § 75.22 (2009) ("While the testimony of an informer is competent evidence, it should be accompanied by instructions designed to call the attention of the jury to the character of the informer, leaving to the jury the question of the value and credibility of his testimony.").

The defense requested instruction should have been given in this case because of the centrality of Jacobsen's testimony to the conviction of Gasteazoro-Paniagua. Muro could not identify his shooter. He was impeached, but that impeachment was not to be used as substantive evidence. The remaining evidence was largely circumstantial and largely related to Gasteazoro-Paniagua's actions after the crime.

The trial judge refused to give the instruction only because it had not been approved by an appellate court. Thus, even if this Court concludes that the trial court had the discretion to give the instruction, rather than was required to give it, this Court cannot say with any confidence that the trial court would not have given the instruction since the trial court refusal was based on an incorrect and unfounded belief that it did not have the discretion to give the instruction.

Obviously, such an instruction would have been most helpful to defendant. It very well could have prevented this conviction.

D. The Trial Court Erred by Permitting the Introduction of Inconsistent Statements by Victim Muro Without First Asking Him About Those Statements; Where the Court Failed to Give a Limiting Instruction for One of Those Statements; and Where the Prosecutor Unfairly Implied that Jurors Could Use the Statements as Substantive Evidence.

ER 613(b) provides that extrinsic evidence of a prior inconsistent statement is not admissible in the absence of a proper foundation. ER 613(b); *State v. Horton,* 116 Wn.App. 909, 914, 68 P.3d 1145 (2003).

The rule states in part, "Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon." While prerule case law required the examiner, before introducing extrinsic evidence of a prior inconsistent statement, to direct the declarant's attention to the exact content of the allegedly contradictory statement as well as to the time and place where the declarant made the statement and to the persons present. Under ER 613(b), however, it is sufficient for the examiner to give the declarant an opportunity to explain or deny the statement, either on cross-examination or after the introduction of extrinsic evidence. *McCormick on Evidence, supra,* § 37, at 121-22; *see also United*

States v. McLaughlin, 663 F.2d 949, 953 (9th Cir.1981); *Shaw v. Sjoberg,* 10 Wash.App. 328, 331, 517 P.2d 622 (1973).

The traditional foundation requirements serve to de-emphasize the substance of the prior statement and to emphasize the fact that the witness was telling a different story in court. To permit a party to simply introduce a prior inconsistent statement of its own witness could, to say the least, mislead the jury into thinking the statement was proof of the matter asserted, especially where a limiting instruction was read in one case, but not the other.

The inconsistent statements should not have been admitted in this case. The danger of the misuse of those statements was vividly demonstrated by the prosecutor's own argument that Gasteazoro-Paniagua did not prove someone else shot the victim. Rather than pointing to the remaining affirmative evidence of guilty (which was scant), the State instead switched the focus (and the burden) by arguing that no evidence of a viable other suspect had been produced. In other words, the prosecutor not only placed an unconstitutional burden on defendant (discussed at greater length later in this brief), it used Muro's statements that Gasteazoro-Paniagua shot him as proof that defendant was the shooter.

This Court should reverse.

E. The Trial Court Erred By Not Granting a New Trial Where a Police Officer Testified that Their Investigation Led to the Conclusion that Gasteazoro-Paniagua Was the Shooter.

F. The Trial Court Erred by Permitting the Backdoor Admission of Testimonial Hearsay.

These two claims of error are grouped together because the harm from each was similar. Considered individually or cumulatively, reversal is required.

At trial, a police officer was permitted to testify that he could not personally identify the person in the surveillance video as Gasteazoro-Paniagua, but "(t)hat's what our investigation – led to." RP 602. The State was also permitted to introduce the substance of statements made by Mr. Muro's family to police about the dispute between Muro and Gasteazoro-Paniagua. See RP 839 – 840; RP 1647 - 1649. In addition, the State was permitted to introduce testimony by police officers that defendant's wife, who did not testify, told them about various locations where items of evidentiary value were recovered. See RP 853 – 854; RP 859 - 861.

The statements made by the above-referenced witnesses to police officers clearly constituted "testimonial hearsay." They were statements made to police officers who were conducting a criminal investigation. *Crawford v. Washington,* 541 U.S. 36 (2004).

The State will undoubtedly argue that any hearsay statements (or the substance of any out-of-court statements) were not admitted for the truth of the matter. Even if that was case, it makes no difference. See *Shepard v. United States,* 290 U.S. 96, 103-04 (1933) (holding that the government could not introduce out-of-court accusation for nonhearsay purpose because the jury would not reasonably have been able to avoid considering it for the truth of the matter asserted; "[t]he reverberating clang of those accusatory words would drown out all weaker sounds"); *United States v. Silva,* 380 F.3d 1018, 1020 (7th Cir. 2004) (reversing conviction because of prejudicial effect of inculpatory hearsay supposedly offered for nonsubstantive purposes; "Under the prosecution's theory, every time a person says to the police 'X committed the crime,' the statement (including all corroborating details) would be admissible to show why the police investigated X. That would eviscerate the constitutional right to confront and cross-examine one's accusers."); *United States v. Hearn,* 500 F.3d 479 (6th Cir. 2007) (same); *State v. Johnson,* ___ N.W.2d ___, 2009 WL 2319235 (N.D. July 29, 2009) (same); *but see Szymanski v. State,* 166 P.3d 879 (Wyo. 2007) (allowing incriminating statements to be admitted for dubious nonhearsay purpose). It is "most unusual," upon close inspection, that the government has a genuine need to explain the course of its

investigation. *See, e.g., Brown v. State*, 549 S.E.2d 107, 111 (Ga. 2001); *see also State v. Broadway*, 753 So.2d 801 (La. 1999). And even when the government does have a legitimate need to present such evidence, that need can often be accommodated by allowing an officer to testify that he acted "upon information received" or words that effect. *United States v. Maher,* 454 F.3d 13, 23 (1st Cir. 2006); *United States v. Price*, 458 F.3d 202, 208 (3rd Cir. 2006); *State v. Vandeweaghe*, 827 A.2d 1028, 1035 (N.J. 2003); *State v. Braxter*, 568 A.2d 311, 315 (R.I. 1990); *State v. Adams,* 131 P.3d 556 (Kan. App. 2006), *rev'd on other grounds,* 153 P.3d 512 (Kan. 2007) (prosecutors may not "elicit[] unnecessary and damning details to establish the motivation for police investigation").

Washington caselaw has consistently held that hearsay is inadmissible, even where offered to show the course of an investigation or why police took certain steps. See *State v. Lowrie,* 14 Wn.App. 408, 412-13, 542 P.2d 128 (1975); *State v. Stamm,* 16 Wn.App. 603, 611, 559 P.2d 1 (1976); *State v. Wicker,* 66 Wn.App. 409, 412, 832 P.2d 127 (1992); *State v. Edwards,* 131 Wn.App. 611, 614-15, 128 P.3d 631 (2006).

In this case, there was no need for the State to introduce these statements in order to prove the course of the police investigation.

In this case, there was no need for the State to introduce these statements in order to prove the course of the police investigation. Instead, what the State was permitted to do was introduce the substance of testimonial hearsay through the backdoor.

Not only was the State allowed to admit hearsay to explain the course of its investigation, turning defendant's wife and others into unsworn witnesses against him, but the State was also permitted to introduce its conclusion that defendant was guilty—that the police investigation led to one person. The State capitalized on this point by arguing that Gasteazoro-Paniagua had not proved that any other person shot the victim. In this way, the State increased the unfair prejudice.

This was a classic example of the State attempting to shore up a weak case with improper hearsay and opinion testimony. The result was that Gasteazoro-Paniagua was tried based on evidence that was beyond the scope of cross-examination.

Gasteazoro-Paniagua was harmed because the evidence certainly contributed to the verdict in this case. If the State's case had been confined to constitutionally permissible and admissible evidence, there is more than a reasonable likelihood that jurors would have harbored reasonable doubts.

G.1. The Prosecutor's Arguments That Jurors Should Find Gasteazoro-Paniagua Guilty Because He Had Not Proved Someone Else Shot the Victim Was Flagrant and Ill Intentioned.

G.2. The Prosecutor's Argument That Gasteazoro-Paniagua's Testimony Should Be Disbelieved Because He Testified After Other Witness Was Misconduct, Especially Where the Prosecutor Did Not Establish Those Facts During Cross-Examination.

G.3. Mr. Gasteazoro-Paniagua Was Denied Effective Assistance of Counsel When Counsel Failed to Object to These Arguments.

During closing argument, the prosecutor made several improper arguments. Defense counsel failed to object. Both arguments were flagrant and ill intentioned. In neither case was it reasonable for counsel to sit silent. First, the prosecutor argued that Gasteazoro-Paniagua bore a burden of proof: "There's been no alternative theory, no alternative suspect." RP 1989. Then, he argued that Gasteazoro-Paniagua had "the advantage of sitting through and listening to all the testimony." RP 1993. Both of these arguments constituted an improper, but continuing attempt by the State to shore up a very weak case.

This Court should reverse because both arguments subvert the basic constitutional framework of a trial—penalizing a defendant for attending his own trial and ignoring the presumption of innocence and implying that a defendant must prove that some other person is guilty in order to be acquitted himself. Additionally, this Court

should reverse because counsel's deficient failure to object undermines confidence in the verdict. Given the weaknesses in the State's case, the improper arguments almost certainly contributed to the verdict.

No Alternative Suspect Means Defendant is Guilty

This argument went far beyond the State's argument that they should draw a negative inference from defendant's failure to call one of the individuals who saw him after the crime. That argument, although it was also improper, did not so clearly attempt to negate the presumption of innocence and shift the burden of proof to defendant.

As the prosecutor surely knew, the threshold to admit "other suspect" evidence is high. See *State v. Russell,* 125 Wn.2d 24, 77, 882 P.2d 747 (1994). Requiring a defendant to admit other suspect evidence when he claims he is not responsible for the charged crime has never been an accepted legal standard anywhere. Arguing that a defendant's failure to present other suspect evidence is proof of guilty fundamentally interferes with the presumption of innocence and the burden of proof, which always remains on the State. The presumption of innocence is the bedrock upon which the criminal justice system stands.... The presumption of innocence can be diluted and even washed away if reasonable doubt is defined so as to be

illusive or too difficult to achieve. This court, as guardians of all constitutional protections, is vigilant to protect the presumption of innocence. *State v. Bennett,* 161 Wash.2d 303, 315-16, 165 P.3d 1241 (2007). Due process requires that the State bear the burden of proving every element of the crime beyond a reasonable doubt. *In re Winship,* 397 U.S. 358, 364 (1970); *State v. Cantu,* 156 Wash.2d 819, 825, 132 P.3d 725 (2006).

The Washington Supreme Court recently held that an argument that the reasonable doubt standard "doesn't mean, as the defense wants you to believe, that you give the defendant the benefit of the doubt," was improper. *State v. Warren*, 165 Wash.2d 17, 195 P.3d 940 (2008). The argument advanced by the prosecutor in this case offends the Constitution in the same manner.

Penalizing the Defendant's Decision to Testify

The prosecutor did not just attempt to eradicate the presumption of innocence and switch the burden of proof. The prosecutor also sought to have jurors penalize his testimony, arguing that Gasteazoro-Paniagua's presence during trial should be held against him.

The Washington Supreme Court recently held that cross-examination to this effect was proper, but strongly suggested that

argument along this lines (where defendant did not have a chance to contest the contention) was improper.

The Washington Supreme Court recently held that a prosecutor could cross-examine a testifying defendant by noting that he was testifying after others and could conform his testimony appropriately. *State v. Martin,* __ Wash.2d __, __ P.3d __ (May 19, 2011). However, while the Court approved these types of questions during cross-examination, the Court strongly implied that if these types of comments were made only during argument, they would be objectionable. The Court held: we believe that in a case such as the instant, where the credibility of the defendant is key, it is fair to permit the prosecutor to ask questions that will assist the finder of fact in determining whether the defendant is honestly describing what happened." *Slip Opinion,* p. 16.

However, the Court also distinguished suggestions of tailoring that were appropriate during cross-examination with an argument made that was not preceded by such cross-examination. "It is during cross-examination, not closing argument, when the jury has the opportunity to determine whether the defendant is exhibiting untrustworthiness." *Id.*

In this case, the prosecutor did not cross-examine on this point, but instead saved it for argument where the defense could not

respond. As a result, the prosecutor's comments were constitutional error.

Both instances of misconduct impinge on constitutional rights. As a result, the State bears the burden of proving both errors harmless beyond a reasonable doubt. On this record, they cannot do so. As a result, reversal is required.

H. The Trial Court Erred by Instructing Jurors That They Must Be Unanimous to Acquit Gasteazoro-Paniagua of the Firearm Enhancement.

There can be little question but that the instruction telling jurors they needed to be unanimous to acquit Gasteazoro-Paniagua of the firearm enhancement was error. *State v. Bashaw,* 169 Wash.2d 133, 234 P.3d 195 (2010), is directly on point and holds all that is required to acquit a defendant of a deadly weapon or firearm enhancement is the vote of one juror. Though unanimity is required to convict, it is not required to acquit. *Id.* at 147.

The doctrine of retroactivity does not preclude application of *Bashaw* to this case, as the trial judge mistakenly concluded. Instead, new rules apply to any case not final at the time the rule is announced. A conviction only becomes final after it is affirmed on direct appeal. *State v. Evans,* 154 Wash.2d 438, 448, 114 P.2d 627 (2005).

The only real question is whether Gasteazoro-Paniagua was harmed by the instruction. *Bashaw* applied a "harmlessness beyond a reasonable doubt" test. Instead, because the error is structural, prejudice is automatic and reversal is always required.

An inadequate reasonable doubt instruction constitutes a structural error and always requires reversal. *Sullivan v. Louisiana,* 508 U.S. 25, 281 (1993). *Sullivan* noted, consistent with the jury-trial guarantee, the question an erroneous instruction requires the reviewing court to consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. The Court continued:

> But the essential connection to a 'beyond a reasonable doubt' factual finding cannot be made where the instructional error consists of a misdescription of the burden of proof, which vitiates *all* the jury's findings. A reviewing court can only engage in pure speculation-its view of what a reasonable jury would have done. And when it does that, the wrong entity judges the defendant guilty.

508 U.S. at 581 (internal quotation removed; emphasis in original).

In this case, the instruction required unanimity, when only one juror vote was necessary to acquit. Like an erroneous reasonable doubt instruction, the misdescription of the unanimity requirement vitiates all of the jury's findings. There is no way to determine whether one juror voted or would have voted "no," if the

jury knew that one "no" vote resulted in acquittal, instead of a mistrial.

The error in this case is fundamentally different than an instruction which omits or misdescribes a single element of an offense, which can be held harmless. See *Neder v. United States,* 527 U.S. 1, 10-11 (1999).

In this case, there is no verdict upon which this Court can conduct harmlessness review. This is not a case, like *Neder,* where other jury findings on the firearm enhancement stand, but a single part of the verdict was missing. The instruction in this case vitiates the entire firearm verdict. *Neder,* 527 U.S. at 11.

As a result, this Court should reverse.

IV. CONCLUSION AND PRAYER FOR RELIEF

This case was marked by several, serious errors. Mr. Gasteazoro-Paniagua was denied the opportunity to attend significant portions of his trial as the result of a disturbing "bait and switch" conducted by the trial court. A great deal of inadmissible evidence was admitted, and then capitalized on by the State—sometimes exceeding the bounds of admissibility. This was, in short, a classic weak case strengthened by misconduct and error.

Based on the above, this Court should reverse and remand for a new trial.

DATED this 31st day of May, 2011.

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APPENDIX A

INSTRUCTION NO._____

Testimony of Mr. Trent Jacobson given on behalf of the Plaintiff, should be subjected to careful examination in the light of other evidence in the case, and should be acted upon with great caution. You should not find the defendant guilty upon such testimony alone unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth.

WPIC 6.05

APPENDIX B

INSTRUCTION NO. 22

You will also be given a special verdict form for the crime of Attempted Murder in the First Degree as charged in Count 1. If you find the defendant not guilty of this crime, do not use the special verdict form. If you find the defendant guilty of Attempted Murder in the First Degree, as charged in Count 1, you will then use the special verdict form and fill in the blank with the answer "yes" or "no" according to the decision you reach. Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form. In order to answer the special verdict form "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no".

CERTIFICATE OF SERVICE

I, B. Renee Alsept, certify that on 05/31/2011, I personally delivered and emailed a copy of Appellant's *Opening Brief* to opposing counsel:

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Portland, Oregon
Date and Place

B. Renee Alsept

CERTIFICATE OF SERVICE

I, Vance G. Bartley, Paralegal for the Law Offices of Alsept & Ellis, LLC, certify that on June 1, 2011 I served the parties listed below with a copy of Appellant's Opening Brief as follows:

Jose Gasteazoro-Paniagua
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6-1-2011, Sea WA
Date and Place

V. Bartley
Vance G. Bartley